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IN THE

SUPREME COURT OF THE UNITED STATES

No. 05-

JUAN MIGUEL GONZALEZ,

Petitioner,

v.

UNITED STATES,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Juan Miguel Gonzalez respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the Eleventh Circuit affirming the District Court's judgment of conviction and sentence is not published, but is reprinted in the appendix hereto ("App.") at 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on July 13, 2005. App. 1a. A timely petition for rehearing and rehearing en banc was denied on September 14, 2005. App. 17a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rule of Criminal Procedure 52(a) provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

Federal Rule of Evidence 103(a) provides that an "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."

The Fifth Amendment to the Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury ... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law...

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence."

INTRODUCTION

This case presents two important and recurring questions in the application of the harmless error doctrine, about which the lower courts are in conflict. First, who bears the burden of persuasion to show harm, or harmlessness, from a preserved evidentiary error in a criminal trial, the government (as the beneficiary of the error) or the defendant (as the party asserting the error)? Second, when does the erroneous exclusion of material defense evidence trigger the more defense-friendly standard of harmless error review for constitutional errors set forth in *Chapman v. California*, 386 U.S. 18 (1967), rather than the standard established in *Kotteakos v. United States*, 328 U.S. 750 (1946) for non-constitutional errors?

After two hung juries and a mid-trial mistrial, petitioner Juan Miguel Gonzalez ("Gonzalez") was convicted at his fourth trial of two narcotics offenses: possession with intent to distribute cocaine and conspiracy to import cocaine. A panel of the Eleventh Circuit held that the district court erred by excluding evidence that tended to inculpate a third party, not Gonzalez, as the real source of the cocaine involved in the case. Although the Eleventh Circuit acknowledged that the excluded evidence was ***material*** to both counts, the Court concluded that the evidentiary error affected Gonzalez's substantial rights on

the possession with intent to distribute count, but not on the importation conspiracy count.

The Eleventh Circuit reached its conclusion after placing the burden ***on Gonzalez*** to establish prejudice from the ***preserved*** evidentiary error. Moreover, the Court of Appeals applied the "substantial influence" test for non-constitutional errors first announced in *Kotteakos*, rather than the "harmless error beyond a reasonable doubt" standard for constitutional errors announced in *Chapman*, even though the error implicated Gonzalez's constitutional right to present a defense.

This Court should grant certiorari because the decisions of the courts of appeal are in demonstrable conflict and disarray on the allocation of the burden of persuasion for harmless error review, and on the appropriate standard for errors which involve the ***exclusion*** of material defense evidence. The need for uniformity and clarity is especially critical because the issue of harmless error review arises in virtually every case in which evidentiary error is preserved and raised on appeal. Additionally, the assignment of the burden – and the degree to which it must be carried – is often outcome-determinative, as it was here.[1]

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[1] Currently pending before this Court is a petition for writ of certiorari which raises the related question of whether the government necessarily waives harmless error review by failing to raise harmlessness on appeal. *See Marvin Smith v. United States*, Case No. 05-724.

STATEMENT OF THE CASE

1. In November 1998, federal agents seized 17 kilograms of cocaine at a home in Miami, Florida. The kilogram wrappers contained the notation "357." After a brief investigation, the agents arrested Luis Perez, the distributor of the cocaine.

On March 12, 1999, federal agents at Port Everglades, Florida, discovered 700 kilograms of cocaine secreted in the false bottom of a container that had arrived by container ship from Guayaquil, Ecuador. The kilogram wrappers in that container shipment also contained the notation "357." The container, which also contained ceramic tiles, had been consigned to Yalorde Tile, a Miami-based corporation which imported tile into South Florida, primarily from Spain and Ecuador. Petitioner Gonzalez was the owner of Yalorde Tile.

2. In exchange for a reduced sentence, Luis Perez told the government that Gonzalez was the importer and Perez's supplier of the "357" cocaine. On September 19, 2000, a federal grand jury indicted Gonzalez, and others, for cocaine offenses, including possession with intent to distribute ("possession count"), in violation of 21 U.S.C. §841(a)(1), and conspiracy to import ("importation count"), in violation of 21 U.S.C. §963. The possession count related to the seizure of the 17 kilograms from the Miami home in November 1998. The importation count related to the seizure of the 700 kilograms from the container ship at Port Everglades in March 1999.

3. After a mid-trial mistrial and two hung juries, Gonzalez went to trial for a fourth time on January 21, 2003. On the possession count, witness Perez's testimony was the only direct evidence that Gonzalez was his source of the cocaine. There were no confessions, tape recordings, telephone records, or other physical evidence implicating Gonzalez. On the

importation count, the primary direct evidence was the fact that Gonzalez's tile company was the consignee of a container with a false bottom in which 700 kilograms were secreted. The government sought to link the two counts through the identical numerical markings ("357") on the kilogram wrappers from both seizures.

4. Gonzalez's defense was that witness Perez was implicating him to protect Perez's real supplier, an indicted fugitive cocaine importer named Jorge Luis Vasquez. To that end, Gonzalez elicited testimony that witness Perez had a close, long-standing relationship with fugitive Vasquez and that Vasquez was the godfather to witness Perez's son. Gonzalez also presented phone records and other documents to show that Perez communicated frequently with Vasquez during the time period in which Perez was allegedly receiving cocaine from Gonzalez, and that Perez had made large cash purchases on behalf of Vasquez during the fall of 1998. Gonzalez also presented testimony from witnesses who overheard witness Perez admit that his true drug supplier was fugitive Vasquez, and that Vasquez had connections at local ports to pull out containers before they reached their final destination.

5. The district court, however, precluded Gonzalez from presenting testimony that fugitive Vasquez and witness Perez actually engaged in cocaine transactions together dating back to 1994-95. The district court also precluded Gonzalez from presenting customs broker invoices and telephone records proving that fugitive Vasquez had used a front company to import nine container shipments of "produce" from Guayaquil, Ecuador into South Florida in late 1997, in a manner strikingly similar to the March 1999 importation charged in this case, while at the same time communicating with Perez and unknown persons in Colombia and Venezuela. Gonzalez had argued that the excluded evidence would show that fugitive Vasquez had the knowledge, ability, and experience to import the "357"

cocaine from Guayaquil, Ecuador, and supply it to witness Perez. The district court ruled that the evidence was temporally remote and collateral because it did not directly prove that Vasquez was the source of the cocaine in this case. The jury convicted Gonzalez of the possession count and importation count.[2]

6. On appeal a panel of the Eleventh Circuit affirmed in part and reversed in part. The Eleventh Circuit held that the district court erred by excluding the proffered defense evidence because it "went to the heart of the defense and was material." App. 14a. The Court of Appeals reasoned that the excluded evidence "would have supported an inference crucial to the defense theory: that Perez had a motive to protect Vasquez, a person with whom Perez had a prior drug trafficking relationship." *Id.* 11a. The Court of Appeals further reasoned that "evidence that Vasquez had supplied Perez with cocaine in 1994-95 was otherwise 'relevant' under Fed.R.Evid. 401– it tends to show that it was more likely that Vasquez may have supplied the drugs to Perez in late 1998." *Id.* The Eleventh Circuit observed that "the excluded evidence tends to show that Vasquez had the means to import drugs in the manner charged in this case, which supports the defense theory that Vasquez was the true drug supplier in this case." *Id.* 12a. Finally, the Eleventh Circuit stated that "we have no difficulty in determining that the excluded evidence makes a factor favorable to the defense theory more probable: that Vasquez cannot be ruled out as the importer of the cocaine in this case." *Id.*.

Nonetheless, the Court of Appeals concluded that the preserved evidentiary error affected Gonzalez's substantial

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[2] Petitioner was acquitted of conspiracy to possess cocaine with intent to distribute. Petitioner's codefendants were acquitted of all counts.

rights on only the possession count, not the importation count. In the Eleventh Circuit's view, Gonzalez had failed to establish that the error affected his substantial rights on the importation count because several facts corroborated the government's theory on that count. *Id.* 14a-15a. Thus, the Court of Appeals concluded that it was not "left in grave doubt" that "the error itself had substantial influence" on the jury's verdict. *Id.* 15a (*quoting United States v. Stephens*, 365 F.3d 967, 977 (11th Cir. 2004)).

In reaching this conclusion, the Eleventh Circuit placed the burden of persuasion ***on Gonzalez*** to demonstrate that the error affected his substantial rights, rather than on the government to demonstrate that the error was harmless. *Id.* 8a. The Court of Appeals expressly relied on its published opinion in *Stephens*, 365 F.3d at 977, wherein it reiterated that the party asserting error bears the burden of establishing that the error affected his substantial rights. Moreover, although the Eleventh Circuit concluded that the excluded evidence was material and favorable to Gonzalez's defense, the Court of Appeals did not apply the harmless error standard applicable to constitutional violations under *Chapman v. California*.

Gonzalez filed a timely petition for rehearing and rehearing en banc, which was denied on September 14, 2005. *Id.* 17a.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit rule, which assigns to criminal defendants the burden of demonstrating harm from a preserved evidentiary error, is contrary to the precedents of this Court and of every other court of appeals. Moreover, when the preserved evidentiary error involves the exclusion of evidence material to the defense, the appellate courts have issued irreconcilably

inconsistent decisions on whether the error triggers the heightened standard of harmless error review under *Chapman*. The Court should grant certiorari to resolve the conflicts and clarify the law on these important and recurring issues.

I. The Court Should Overrule Eleventh Circuit Precedent Which Places The Burden On Criminal Defendants To Demonstrate Prejudice from Preserved Evidentiary Errors

The harmless error standard for preserved trial errors is set forth in Rule 52(a) of the Federal Rules of Criminal Procedure, which provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." *See also* 28 U.S.C. § 2111; Fed.R.Evid. 103(a) (evidentiary error). In at least three cases over the past 12 years, this Court has stated, but not squarely held, that in a federal criminal case the government carries the burden to show that a preserved trial error was harmless. *See United States v. Vonn*, 535 U.S. 55, 62 (2002) (noting that the government must "carry the burden of showing that any error was harmless, as having no effect on the defendant's substantial rights."); *O'Neal v. McAninch*, 513 U.S. 432, 437-41 (1995) (noting the common-law rule which put the burden on the "beneficiary of the error" to prove the absence of injury); *United States v. Olano*, 507 U.S. 725, 734 (1993) (distinguishing "harmless error" under Rule 52(a) from "plain error" under Rule 52(b) on the basis of who carries the burden).

That the government bears the burden of establishing harmlessness from a preserved error in a federal criminal case should no longer be in doubt, because that principle was the fundamental bedrock of the Court's decision in *O'Neal*. In *O'Neal*, this Court held that the State bears the burden of persuasion on federal habeas review to establish harmlessness

from a preserved trial error. *O'Neal*, 513 U.S. at 437-40. This Court relied in part on "the original common-law harmless-error rule [which] put the burden on the beneficiary of the error ... to prove that there was no injury," *id.* (quoting *Chapman*, 386 U.S. at 24), and noted that the Court had applied the common law rule to federal criminal cases in *Kotteakos*, 328 U.S. at 764-65.

Notwithstanding these decisions, the Eleventh Circuit imposed the burden on Gonzalez to establish that his substantial rights were affected by the erroneous exclusion of material defense evidence. App. 7a-8a. In so doing, the Court of Appeals relied on its earlier published decision in *Stephens*, wherein it held that ***the defendant*** bears the burden of proving prejudice from preserved evidentiary errors under Rule 52(a). 365 F.3d at 974 & 977 n.11. *Stephens* merely reiterated what the Eleventh Circuit has repeatedly held, or at least expressed, in other cases. *See, e.g., United States v. Breitweiser*, 357 F.3d 1249, 1254 (11th Cir.), *cert. denied*, 541 U.S. 1091 (2004) (An evidentiary ruling will stand "unless the complaining party has shown a 'substantial prejudicial effect.'") (citation omitted); *United States v. Burston*, 159 F.3d 1328, 1336 (11th Cir. 1998) ("Erroneous evidentiary rulings will not result in reversal if they are 'harmless,' meaning that the party asserting error has not shown prejudice to a substantial right."); *United States v. Saget*, 991 F.2d 702, 709 (11th Cir.), *cert. denied*, 510 U.S. 950 (1993) ("Even if the district court abused its discretion by admitting or excluding evidence, the conviction must be affirmed unless the defendant can meet its burden of demonstrating that substantial rights were affected by the error."); *United States v. Cameron*, 907 F.2d 1051, 1059 (11th Cir. 1990) ("The burden of demonstrating that substantial rights were affected rests with the party asserting error.").

Admittedly, the Eleventh Circuit's decisions have been internally inconsistent. Some panels of the Eleventh Circuit have, like all other circuits, correctly saddled the government

with the burden of persuading that a preserved trial error was harmless. *See, e.g., United States v. Magluta*, 418 F.3d 1166, 1180 (11th Cir. 2005) (evidentiary error); *United States v. Monroe*, 353 F.3d 1346, 1352 (11th Cir. 2003) (other trial error); *United States v. Fern*, 155 F.3d 1318, 1327 (11th Cir. 1998) (instructional error). Although it might be tempting for this Court to wait for the Eleventh Circuit to resolve its own internal conflict, the Court should resist that temptation and grant the petition, for several reasons.

First, similar internally conflicting decisions plague many of the other circuits, including the Fifth, Seventh, and Tenth Circuits. *Compare, e.g., United States v. Vaughn*, 370 F.3d 1049, 1051 (10th Cir. 2004) ("The government bears the burden to show that a non-constitutional [evidentiary] error is harmless by a preponderance of the evidence."), *with United States v. Mitchell*, 113 F.3d 1528, 1532 (10th Cir. 1997), *cert. denied*, 522 U.S. 1063 (1998) ("[T]he burden of demonstrating that substantial rights were affected rests with the party asserting error.") (citation omitted), *and United States v. Messner*, 107 F.3d 1448, 1454-55 (10th Cir. 1997) (defendant bears the burden of demonstrating that erroneous admission of evidence affected his substantial rights); *compare, e.g., United States v. Munoz*, 150 F.3d 401, 413 (5th Cir. 1998) ("The government bears the burden of showing harmless error."), *cert. denied*, 525 U.S. 1112 (1999), *with United States v. Izydore*, 167 F.3d 213, 218 (5th Cir. 1999) ("The burden of proving substantial prejudice lies with the party asserting error."); *compare, e.g., United States v. Gochis*, 256 F.3d 739, 743 (7th Cir. 2001) (government bears the burden of persuasion with respect to prejudice), *with United States v. Dack*, 987 F.2d 1282, 1284 (7th Cir. 1993) ("It is the party raising error who bears the burden of showing prejudice."), *and United States v. Montoya*, 827 F.2d 143, 154 (7th Cir. 1987) ("And finally, we note that the party challenging the error has the burden of proving that the error was substantial, not merely harmless."). The confusion appears to

have resulted from the circuit courts' reflexive, yet mistaken, reliance on decisions in ***civil*** cases which impose the burden on the complaining party. *See Izydore*, 167 F.3d at 218 (relying on civil case); *Messner*, 107 F.3d at 1453 (same); *Dack*, 987 F.2d at 1284 (same).[3]

Second, the conflicting decisions among and within the circuits have existed for a long time without resolution. These decisions have been issued both before and after this Court's decisions in *Olano*, *O'Neal*, and *Vonn*. There is no reason to believe that this confusion will dissipate on its own. Third, this is an important and recurring issue, inasmuch as harmless error review arises in virtually every case in which there is a trial error.

Finally, this case is the perfect vehicle to clarify the confusion. The allocation of the burden to the defendant instead of the government is "an important difference." *Olano*, 507 U.S. at 734. In this case, the Eleventh Circuit's assignment of the burden to Gonzalez was outcome-determinative because two prior juries were deadlocked on the importation count. Thus,

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[3] Even in civil cases, there is uncertainty whether the party asserting, or benefitting from, the error bears the burden of demonstrating prejudice from a preserved trial error. *See generally O'Neal v. McAninch*, 513 U.S. at 441; *id.* at 449-50 (Thomas, J., dissenting); *Rogers v. City of Chicago*, 320 F.3d 748, 751 (7th Cir. 2003) (parties asserting evidentiary error bear the burden of showing their substantial rights were affected); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 102 (1st Cir. 1997) ("In a civil case, the party asserting error bears the burden of demonstrating that the error was harmful, i.e., that it affected that party's substantial rights."); *Finch v. City of Vernon*, 877 F.2d 1497, 1504 (11th Cir. 1989); *Crumpton v. Confederation Life Ins. Co.*, 672 F.2d 1248, 1253 (5th Cir. 1982).

the government cannot demonstrate that the exclusion of evidence of fugitive Vasquez's relationship with witness Perez and his previous importations from Guayaquil, Ecuador, was harmless. *See, e.g., Christopher v. State of Florida*, 824 F.2d 836, 847 (11th Cir. 1987), *cert. denied*, 484 U.S. 1077 (1988) (conclusion that error not harmless "buttressed by the fact that the [defendant's] first trial resulted in a hung jury."); *Clark v. Blackburn*, 632 F.2d 531, 535 (5th Cir. 1980) (conclusion that error not harmless "is strengthened by the fact that petitioner's first trial ended in a hung jury..."); *Zappulla v. New York*, 391 F.3d 462, 471 (2d Cir. 2004), *cert. denied*, 126 S.Ct. 472 (2005) (*Brady* violation not harmless because "the fact that the first trial resulted in a hung jury ... suggests that the case was close."); *United States v. Paguio*, 114 F.3d 928, 935 (9th Cir. 1996) (error not harmless "because the hung jury at the first trial persuades us that the case was close and might have turned on this evidence."); *United States v. Ince*, 21 F.3d 576, 585 (4th Cir. 1994) (evidentiary error not harmless; if case was strong, "it seems unlikely that the first jury would have ended in deadlock."); *United States v. Schuler*, 813 F.2d 978, 982 (9th Cir. 1987) (prior hung jury a factor to consider in determining whether error is harmless); *United States v. Sanders*, 964 F.2d 295, 299 (4th Cir. 1992) (inability of first jury to reach a verdict is "critical fact" in determining whether error is harmless). This Court should grant certiorari to resolve the internal and external conflicts and to clarify the confusion regarding the "harmless error" burden for preserved trial errors.

II. The Court Should Clarify That The Erroneous Exclusion Of Relevant And Favorable Defense Evidence Requires Application Of The Harmless Error Rule Of *Chapman v. California*

The lower courts have also issued conflicting decisions on the degree to which the harmless error burden must be

satisfied when the error involves the exclusion of relevant and favorable defense evidence. The conflict stems from confusion over whether the an erroneous trial ruling excluding relevant evidence amounts to a constitutional, or non-constitutional, error.

Generally speaking, when a trial court's evidentiary ruling at a criminal trial violates a defendant's constitutional rights (and the error is not a "structural" one), reversal is required unless the government can demonstrate that the violation was harmless ***beyond a reasonable doubt***. *Chapman,* 386 U.S. at 24; *see, e.g., Delaware v. Van Arsdall,* 475 U.S. 673 (1986) (improper restriction on cross-examination triggers *Chapman* standard). By contrast, where a trial error is deemed a "non-constitutional" error, reversal is required only if it had a substantial and injurious effect or influence in determining the jury's verdict. *Kotteakos*, 328 U.S. at 758-65. Because the *Chapman* standard is substantially more onerous for the government to satisfy, the characterization of an evidentiary error as "constitutional" or "non-constitutional" can make all the difference.

The erroneous exclusion of material defense evidence certainly implicates an accused's constitutional rights. The Compulsory Process Clause of the Sixth Amendment includes a criminal defendant's right to present witnesses or evidence in his defense "even though [it] is not expressly described in so many words." *See Taylor v. Illinois,* 484 U.S. 400, 407-09 (1988); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1974); *Washington v. Texas,* 388 U.S. 14, 18-19 (1967). The Due Process Clause of the Fifth Amendment affords the same protection to a defendant's right to present witnesses. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982).

> The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to

> present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.

Washington v. Texas, 388 U.S. at 19. "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers*, 410 U.S. at 302.

Whether an erroneous trial ruling amounts to a constitutional violation depends on the constitutional right at stake. In the context of the Confrontation Clause of the Sixth Amendment, for example, the test for determining whether a constitutional violation has occurred focuses on whether the improper restriction of cross-examination affected the credibility of the particular witness. *Van Arsdall*, 475 U.S. at 680. The focus for determining the existence of a confrontation violation "is on the individual witness," ***not*** on the effect of the error on the outcome of the trial. *Id.* This Court explained its reason for rejecting the outcome-driven approach as follows:

> It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to "confront[ation]" because use of that right would not have affected the jury's verdict.

Id. at 680. Of course, once a Confrontation Clause violation is established, the government may still demonstrate that the error was harmless beyond a reasonable doubt. *Id.* at 684.

It seems logical that, as with a violation of the Confrontation Clause, the determination of whether an erroneous evidentiary ruling deprived a defendant of his/her Sixth Amendment right to have "***witnesses*** in his favor" should focus on the relevance and importance of the particular witness or evidence, not on whether the evidence would have affected

the outcome of the trial. Yet, a number of courts have adopted an outcome-oriented approach, and have required the defendant to show that the error affected the outcome of the trial as a ***precondition*** to a finding that the constitutional right has been violated. *Washington v. Schriver*, 255 F.3d 45 (2nd Cir. 2001) (requiring that the excluded evidence create a reasonable doubt that did not otherwise exist); *United States v. Dowlin*, 408 F.3d 647 (10th Cir. 2005) (same); *Richmond v. Embry*, 122 F.3d 866, 872 (10th Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998) (same); *United States v. Turning Bear*, 357 F.3d 730, 733 (8th Cir. 2004); *Government of Virgin Islands v. Mills*, 956 F.2d 443, 446 (3rd Cir. 1992). These courts have relied on language from this Court's decision in *Valenzuela-Bernal*, wherein the Court held that the government's deportation of a potential witness before trial does not violate a defendant's Fifth and Sixth Amendment rights unless the defendant can show that the witness would have been "material" and "favorable" to the defense. 458 U.S. at 874. The Court likened that inquiry to the "materiality" requirement of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. *See Valenzuela-Bernal*, 458 U.S. at 868, 874.

Valenzuela-Bernal, however, arose in the context of the Executive Branch's responsibility to execute Congress's immigration policy. Because of those interests at stake, it made sense to require an outcome-oriented showing of materiality and prejudice before allowing an accused's asserted need for a witness's testimony to outweigh enforcement of the nation's immigration policy. That the holding in *Valenzuela-Bernal* is limited to the witness deportation context is apparent from other decisions of this Court, which have assessed claimed violations of the right to present relevant evidence by balancing the defendant's interest in presenting the relevant evidence against other legitimate interests in the criminal trial process, without reference to the outcome of a particular trial. *See, e.g., United States v. Scheffer*, 523 U.S. 303, 308 (1998) (upholding per se rule excluding polygraph evidence); *Rock v. Arkansas*, 483 U.S.

44, 55 (1987) (rejecting rule excluding all hypnotically refreshed testimony); *Chambers*, 410 U.S. at 295 (state hearsay rule must yield to right to present witnesses).

The Ninth Circuit has adopted a test which is consistent with these precedents and eschews an outcome-oriented test for determining whether an erroneous evidentiary ruling is a constitutional violation. *Wood v. State of Alaska*, 957 F.2d 1544, 1549-50 (9th Cir. 1992). The Ninth Circuit asks only: 1) whether the excluded evidence was relevant; and 2) whether other legitimate interests outweigh the defendant's interest in presenting the evidence. *Id.* at 1550; *see also Richmond*, 122 F.3d at 876 (Henry, J., concurring in result) (criticizing outcome-oriented test); *see also Rethinking Harmless Constitutional Error*, 88 Colum. L.Rev. 79, 120 (1988) ("[The Court's reasoning in *Delaware v. Van Arsdall*] implies that courts should eschew reliance on a strict outcome-oriented prejudice test whenever a defendant asserts a right based on the confrontation clause or the compulsory process clause, which also speaks of 'witnesses.'").

Requiring a defendant to establish outcome-oriented materiality or prejudice as a ***pre-condition*** to finding that an erroneous evidentiary ruling violated the constitutional right to present witnesses is the ultimate "contradiction in terms." *Van Arsdall*, 475 U.S. at 680. Such a rule misplaces the burden of persuasion on the defendant to show prejudice and renders the *Chapman* "beyond a reasonable doubt" standard entirely irrelevant to this class of constitutional violations. Under the outcome-oriented materiality test, every constitutional violation would require reversal because prejudice would inhere in the violation itself. After all, if a defendant can show that the excluded evidence would have affected the outcome of the trial, the government will not be able to satisfy the *Chapman* harmless error standard. Likewise, if the defendant cannot show such prejudice, then there is no constitutional violation in the

first place, and the government will not be required to satisfy the *Chapman* standard.

By contrast, focusing on the witness or evidence itself, without analyzing the possible effect of the witness on the outcome, is sensible and consistent with this Court's decision in *Van Arsdall*. To prove a constitutional violation from the improper exclusion of evidence, the defendant would still be required to show that the excluded witness or other evidence was relevant and favorable – even important – to the defense, and that the exclusion was not justified by any other legitimate interests. Once the violation is shown, the burden would then shift to the government to demonstrate that the error was harmless beyond a reasonable doubt – *i.e.*, the *Chapman* standard – so the government would still be protected by the *Chapman* rule. This is how the Court treats analogous Confrontation Clause errors.

To be sure, the right to confront and the right to present witnesses most often serve the same purpose: to elicit evidence favorable to the defense case. In deciding whether a constitutional violation has occurred, it makes no analytical difference whether the evidence was excluded on cross-examination of a government witness or in the defense case. Because these rights are so intertwined, it is no surprise that the courts have treated them interchangeably. Many courts have assumed, without discussion, that the exclusion of relevant and favorable defense evidence is an error of constitutional dimension. *See United States v. Montelongo*, 420 F.3d 1169, 1173-76 (10th Cir. 2005) (applying *Chapman* standard to exclusion of exculpatory evidence elicited on cross-examination); *United States v. Mulinelli-Navas*, 111 F.3d 983, 991-92 (1st Cir. 1997) (applying *Chapman* standard to limitation on right to elicit evidence relevant to defense); *United States v. Todd*, 108 F.3d 1329, 1334 (11th Cir. 1997) ("Having decided that the district court erred in excluding testimony ..., we must

next determine whether the error was 'harmless beyond a reasonable doubt.'") (internal citation omitted); *United States v. Blum*, 62 F.3d 63 (2d Cir. 1995) (applying *Chapman* standard to erroneous exclusion of evidence that witness had stolen money from company and therefore had incentive to implicate another company official); *United States v. Hilliard*, 11 F.3d 618, 620 (6th Cir. 1993), *cert. denied*, 510 U.S. 1130 (1994) (applying *Chapman* standard to exclusion of defense evidence); *United States v. Lewis*, 987 F.2d 1349, 1353 (8th Cir. 1993) (error in excluding prior inconsistent statement harmless beyond a reasonable doubt); *United States v. August*, 984 F.2d 705, 712 (6th Cir. 1992), *cert. denied*, 510 U.S. 854 (1993) (applying *Chapman* standard to exclusion of statements made by defendant to expert witness); *United States v. Hudson*, 970 F.2d 948, 953 (1st Cir. 1992) (applying, without discussion, *Chapman* standard to erroneous exclusion of extrinsic evidence of prior inconsistent statement of government witness); *United States v. Foster*, 815 F.2d 1200, 1202 (8th Cir. 1987) (applying *Chapman* standard to exclusion of defense witnesses whose testimony was relevant to entrapment defense); *United States v. Gibson*, 675 F.2d 825, 833-34 (6th Cir.), *cert. denied*, 459 U.S. 972 (1982) (applying *Chapman* standard to erroneous exclusion of evidence to show defendant's good faith); *United States v. Watson*, 669 F.2d 1374, 1383 (11th Cir. 1982) (exclusion of character witnesses deprived defendant of fifth and sixth amendment rights and error was not harmless beyond a reasonable doubt); *United States v. Davis*, 639 F.2d 239, 244 (5th Cir. 1981) ("If the trial court abuses its discretion in excluding [defense] evidence under Rule 403, the error is of constitutional proportion").

Other panels (including the panel below) have assumed, without discussion, that a district court's exclusion of favorable and material defense evidence, is a non-constitutional error which triggers the *Kotteakos* standard. App.8a, 15a; *Stephens*, 365 F.3d at 977; *United States v. Naiden*, 424 F.3d 718, 721 (8th Cir. 2005); *United States v. Coumaris*, 399 F.3d 343, 349 (D.C.

Cir. 2005); *United States v. Chin*, 371 F.3d 31, 39 (2d Cir. 2004); *United States v. Byrd*, 208 F.3d 592, 594-96 (7th Cir. 2000); *United States v. Shay*, 57 F.3d 126, 134 (1st Cir. 1995); *United States v. Peak*, 856 F.2d 825, 834-35 (7th Cir.), *cert. denied*, 488 U.S. 969 (1988). In each of these cases, the courts applied the *Kotteakos* standard even though the evidence was obviously favorable and material to the defense.

In its decision below, the Eleventh Circuit held that the district court erroneously excluded evidence that was favorable and material to Gonzalez's defense on the possession count and importation count. The excluded evidence would have made it more likely that Vasquez was the real importer and supplier of the cocaine charged in the case. Because there was no legitimate interest that would justify the exclusion of such evidence, the Eleventh Circuit should have treated the error as a constitutional error and applied the *Chapman* standard. Application of the *Chapman* standard would have necessarily resulted in the reversal of Gonzalez's conviction on the importation count (in addition to the possession count), given the deadlocked juries at two earlier trials. This case presents the perfect vehicle for this Court to clarify the confusion and articulate the circumstances under which an erroneous ruling excluding defense evidence amounts to a constitutional error which triggers the *Chapman* standard.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-13611

D. C. Docket No. 00-00239-CR-JEM

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN MIGUEL GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(July 13, 2005)

Before EDMONDSON, Chief Judge, WILSON, Circuit Judge, and RESTANI*, Judge.

PER CURIAM:

Defendant, Juan Miguel Gonzalez, appeals his convictions and sentences for possession with intent to distribute cocaine, 21 U.S.C. § 841(a)(1), and conspiracy to import cocaine, 21 U.S.C. § 963. We affirm his conviction for conspiracy to import cocaine. But we reverse his conviction for possession with intent to distribute cocaine and remand for a new trial.

BACKGROUND

Gonzalez was indicted (1) with Juan "Tito" Gonzalez[1] and Oscar Gomez for possession with intent to distribute cocaine in October and November 1998, and (2) with Tito for conspiracy to import cocaine into the United States in March 1999.[2] The government's theory of the case was that Gonzalez imported cocaine from Ecuador and sold it to Miami customers, including Luis Perez; Perez then sold it to his own customers, including Gomez and Enrique Bover. The government's case

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* Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

[1] Gonzalez is unrelated to Tito Gonzalez. We refer to Defendant as "Gonzalez" and to Tito by his first name.

[2] Gonzalez was convicted on the above-mentioned counts but acquitted of one count of conspiracy to possess with intent to distribute cocaine. Tito and Oscar Gomez were acquitted of all counts.

in large part depended on the testimony of Perez. Gonzalez's defense theory was that Perez implicated Gonzalez to protect the cocaine alleged true supplier: Jorge Luis Vasquez. To substantiate this theory, Gonzalez attempted to establish that Perez had a motive to protect Vasquez, that Vasquez previously had supplied cocaine to Perez, and that Vasquez had arranged for the importation of containers from Ecuador into South Florida while communicating with Perez.

A. The October/November 1998 cocaine deals

Perez testified that he began to sell cocaine in the early 1990s and that he met Gonzalez about 1996 through Tito. Perez stated that he purchased three multi-kilogram quantities of cocaine from Gonzalez in September, October, and November 1998; Tito acted as an intermediary. Perez then sold the cocaine to Bover and Gomez. Perez did not discuss his customers with Gonzalez or Tito. According to Perez, Gonzalez and Tito told him that Gonzalez got his cocaine from Colombian suppliers and that the cocaine was to arrive by ship in containers.

Perez testified that he picked up the cocaine from Gonzalez's garage on the first two occasions and from Tito's garage on the third occasion. Perez then delivered it to his customers, including Bover and Bover's brother-in-law, Orlando Garcia. Bover did not pay Perez fully for the October shipment and owed $51,000. Garcia and Bover were arrested in November 1998.

DEA agents searched Garcia's house and found empty cocaine wrappers with the handwritten marking "357" on them.[3]

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[3] This number had no dots or decimal points. A DEA agent testified that in his experience many kilogram cocaine packages are marked to identify the source of supply or the

Garcia testified that Perez was the only source of cocaine for him and Bover during late 1998. Perez was arrested in January 1999.

During cross-examination of Perez, the defense attempted to prove that Perez was trying to protect Vasquez, the true supplier of the cocaine. The defense tried to show that (1) Vasquez was the "compadre," or godfather, to Perez's son and maintained a close relationship with Perez, (2) Vasquez communicated often with Perez during October and November 1998, and (3) Perez bought thousands of dollars of furniture for Vasquez during that time.

Perez denied that he, while incarcerated, had told two inmates that Vasquez was the true cocaine supplier. The defense then presented the testimony of two convicted felons, Fernando Garcia and Fabian Fabian, who were incarcerated with Perez. These persons testified that Perez indicated that Vasquez, Perez's "compadre." was the true supplier of the cocaine in 1998, and that Perez was afraid to implicate Vasquez. Garcia testified that Vasquez had a connection at the Port of Miami and Port Everglades to "pull out" containers.

On redirect examination, Perez testified that he had not trafficked in drugs with Vasquez. During its case, the defense sought to have Bover testify that Vasquez had in fact supplied cocaine to Perez in 1994 and 1995. The district court excluded this testimony as "collateral" because (1) Bover could not testify that Vasquez was Perez's source for the cocaine charged in the present case and (2) impeachment of Perez could not be proved by extrinsic evidence.

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recipient. This agent also acknowledged that a kilogram of cocaine is 35.7 ounces, but that wholesale cocaine usually is packaged according to the metric system.

The defense also sought to introduce freight invoices that would have established that Vasquez had arranged for several importations of containers of produce from Ecuador to South Florida in late 1997. The defense then attempted to introduce records of Vasquez's cell phone records from this time, showing that Vasquez was calling Perez and persons in Ecuador, Colombia, and Venezuela around the same dates he was calling to arrange for the importation of containers from Ecuador. The district court excluded this evidence as not relevant because the defense did "not have evidence for [Vasquez's] telephone transactions in 1998."

B. The March 1999 cocaine importation

On 12 March 1999, a Port Everglades U.S. Customs officer searched a cargo ship and found a 40-foot container ("container #378-6") that had broken in half, spilling pallets of floor tiles and packages containing 1,500 pounds of cocaine. The cocaine packages had been concealed under a false bottom and bore the same handwritten marking, "357", as the wrappers seized from Orlando Garcia's garage. The container was consigned to Yalorde Tile Company, a Miami business owned by Gonzalez.[4]

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[4] An investigation showed that a container bearing the same number as the one seized in Port Everglades left Miami for Ecuador on 10 January 1999 filled with toiletries and arrived in Ecuador about 19 January 1999. The full container stayed in the port until 2 February, when it left the port and returned empty on 3 February. An inspection company employee testified that the container that left for Ecuador in January 1999 was different from the one that returned to Florida in March 1999, even though they bore the same container number and container numbers are not duplicated.

In February 1999, Yalorde Tile had ordered several containers of tile from an Ecuadorian tile company. Yalorde's representative in Ecuador hired a person to pick up two of these containers, load them with tile, and return them to the port. On 17 February, this person picked up the containers and returned to port on 19 February; the containers left Ecuador on 25 February. The government's theory was that Yalorde's agents in Ecuador switched the original container #378-6 after picking it up on 17 February and replaced it with a false-bottomed container bearing the same number.

DISCUSSION

Gonzalez argues that the district court violated the Federal Rules of Evidence by excluding several items of evidence crucial to his defense theory. First, he argues that the district court should have admitted Bover's testimony that Vasquez supplied cocaine to Perez beginning in 1994-95 (1) as substantive evidence of a narcotics relationship between Perez and Vasquez, which would support the theory that Perez was protecting Vasquez, the true supplier of the cocaine in late 1998, and (2) to rebut Perez's statement that he had not trafficked drugs with Vasquez. Second, Gonzalez points to the excluded freight invoices showing Vasquez's importation of several containers of produce from Ecuador in late 1997 and records of Vasquez's cell phone calls at this time. Gonzalez claims this evidence would have shown that Vasquez had the experience and knowledge to import from Ecuador disguised in containers.[5]

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[5] We reject Gonzalez's other evidentiary arguments. He challenges the district court's exclusion of Perez's tape-recorded statements to Bover that Colombians were the "owners" of the cocaine as evidence of Gonzalez's alleged prior inconsistent statement that Gonzalez, a Cuban, was the owner of the cocaine. But the record supports the district court's factual determination

We review the district court's evidentiary rulings for abuse of discretion. United States v. Miles, 290 F.3d 1341, 1351 (11th Cir. 2002). A district court abuses its discretion "if it misapplies the law or makes findings of fact that are clearly erroneous." United States v. Frazier, 387 F.3d 1244, 1276 (11th Cir. 2004) (citation omitted), cert. denied, 125 S.Ct. 2516 (2005). A district court may not exclude "crucial relevant evidence necessary to establish a valid defense." United States v. Baptista-Rodriguez, 17 F.3d 1354, 1364 (11th Cir. 1994) (citation omitted).

To challenge successfully a verdict on the basis of a district court's incorrect evidentiary ruling, Gonzalez must: (1) "demonstrate either that his claim was adequately preserved or

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that Perez eventually admitted at trial that the Columbians were the owners of the cocaine. According to Perez, Gonzalez served as the middle man between the Colombians, who ultimately "owned" the drugs, and Perez. Thus, Perez made no "prior inconsistent statement" in this matter; no basis existed for admitting the extrinsic taped evidence under Fed.R.Evid. 613(b).

Gonzalez also challenges the exclusion of the report of an Ecuadorian police officer, which allegedly would have shown that container #378-6 may have had excess weight prior to coming under the control of Gonzalez's agents in Ecuador. Although the excluded statement in the police report is contained in a section of the report labeled "Conclusions," it appears that the "conclusion" was nothing more than a reiteration of a report and statement of another person. The report expresses no finding; it just transcribes what a third party said. We cannot say that the district court abused its discretion in classifying this evidence as hearsay and not as "factual findings resulting from an investigation" admissible under Fed.R.Evid. 803(8)(C).

that the ruling constituted plain error"; (2) "establish that the district court abused it discretion in interpreting or applying an evidentiary rule"; and (3) establish that the error affected a substantial right. United States v. Stephens, 365 F.3d 967, 974 (11th Cir. 2004).

Our recent decision in Stephens helps guide us in this case. The mostly undisputed facts in that case showed that a friend of Stephens, Robinson, was arrested for selling methamphetamine to a confidential informant with the George Bureau of Investigation ("GBI"). Robinson then agreed to cooperate with the GBI by organizing a series of meetings with Stephens to purchase methamphetamine. On eight separate occasions, Robinson met with Stephens, and after each meeting, Robinson returned to the GBI with quantities of methamphetamine. These meetings were videotaped and audiotaped, but the contents of the tapes did not show a drug transaction. Stephens, 365 F.3d at 970-72.

At Stephens' trial, the defense proffered the testimony of three witnesses who would testify that Robinson still was selling methamphetamine, even while cooperating with the GBI. The district court excluded the testimony: it determined that whether Robinson had drugs from a source other than Stephens, or whether Stephens was a drug dealer on occasions other than those at issue in the indictment, was "not relevant to this trial." Id. at 972-73. The court described the defense as just "trying to show that Mr. Robinson was a drug dealer or dealing in drugs at other times," and not attempting to establish an independent defense. Id. at 973.

We concluded that the district court abused its discretion because the proffered evidence was admissible under Fed.R.Evid. 404(a) and (b). The excluded evidence was directly material to Stephens's defense theory that Robinson had a motive to setting up Stephens: to escape a lengthy jail sentence

for Robinson. Stephens, 365 F.3d at 974-76.

And we determined that the exclusion of this evidence affected Stephens's substantial rights: "the excluded witness testimony could have substantially influenced the jury's deliberations," given several "disturbing flaws" in the government's remaining evidence. Stephens, 365 F.3d at 977-78. Among other things, we pointed to these things: (1) the absence of corroborating evidence independent of Robinson; (2) the lack of physical evidence tying Stephens to Robinson's drugs; and (3) the claims of Robinson being the "only actual link" between Stephens and Robinson's drugs. Id. at 977-79.

We determined that the district court's reason for excluding the evidence – it "was not relevant because it didn't demonstrate that Robinson actually had drugs from outside sources on the specific dates when he allegedly engaged in drug transactions with Stephens" – established too high of a threshold for the introduction of potentially exculpatory evidence that bolstered the defense theory. Id. at 980.

Turning to the present case, we first conclude that Gonzalez adequately preserved these claims.[6] And we conclude

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[6] The government contends that, because Gonzalez failed to raise it in the district court, we review for plain error his argument that Bover's testimony refuted Perez's disclaimer of a drug relationship with Vasquez. Our review of the record shows that Gonzalez, at trial, did not frame the argument as clearly as he does on appeal. But the district court and defense counsel did discuss the impeachment of Perez's testimony – and the notion that Bover's testimony supported the defense theory that Vasquez and Perez had a drug relationship – as grounds for admitting Bover's testimony. This submission was sufficient to preserve the issue for appellate review. See United States v.

that the district court abused its discretion in excluding (1) testimony about a prior drug trafficking relationship between Perez and Vasquez, and (2) evidence suggesting Vasquez may have had the knowledge and capacity to import containers with concealed drugs in a manner similar to Gonzalez's alleged cocaine importation scheme.

First, Bover's testimony was relevant and not excludable under Rule 608(b), which provides "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness . . . , may not be proved by extrinsic evidence." But such extrinsic evidence "should be admitted . . . where it is introduced to disprove a specific fact material to the defendant's case." United States v. Calle, 822 F.2d 1016, 1021 (11th Cir. 1987). In other words, although extrinsic evidence of Perez's past drug dealings with Vasquez could not be used properly just to attack Perez's general credibility, "such evidence could be used to refute specifics to which [Perez] had previously testified." United States v. Cousins, 842 F.2d 1245, 1249 (11th Cir. 1988).

Taken together with the testimony Gonzalez elicited during Perez's cross-examination of the close, continuing relationship between Perez and Vasquez, Bover's testimony would have been relevant to disprove a specific fact material to Gonzalez's defense. On cross-examination, Perez testified that he did not have "shady business" with Vasquez; and on redirect examination, Perez testified that he had not trafficked drugs with Vasquez. This created the impression to the jury that Vasquez could not have been the supplier of the drugs in this case and that the relationship between Perez and Vasquez,

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Quinn, 123 F.3d 1415, 1420 (11th Cir. 1997) (no formal offer of proof required to preserve objection to ruling excluding evidence where substance of evidence is apparent from context).

although close, did not involve serious and dangerous illegal acts.[7] But Bover's testimony – although also tending to impeach Perez's testimony – would have also portrayed Perez as a person with an added, crucial incentive to protect Vasquez. Such a characterization of the Perez-Vasquez relationship would have supported an inference crucial to the defense theory: that Perez had a motive to protect Vasquez, a person with whom Perez had a prior drug trafficking relationship. See Calle, 822 F.3d at 1021 (stating that the self-interest of a witness is not a collateral issue). And evidence that Vasquez had supplied Perez with cocaine in 1994-95 was otherwise "relevant" under Fed.R.Evid. 401 – it tends to show that it was more likely that Vasquez may have supplied the drugs to Perez in late 1998. See United States v. Tinoco, 304 F.3d 1088, 1120 (11th Cir. 2002) (stating that the standard for what constitutes relevant evidence is low), cert. denied, 123 S.Ct. 1484 (2003).

We also conclude that the evidence about Vasquez's use of containers to import produce from Ecuador in late 1997 and his telephone calls to Perez, Ecuador, Colombia, and Venezuela about this importation was relevant and admissible. The government contends that this conduct evidences purely legal acts and that a jury would have to "pile unreasonable inference upon unreasonable inference" to arrive at the conclusion that Vasquez was importing cocaine from Ecuador in containers. But even by itself, this evidence suggests that Vasquez had the means and knowledge to import containers from Ecuador to South Florida and that he had contacts at the same time with persons in Colombia and Venezuela, known cocaine "source countries." This evidence makes it at least slightly more probable that Vasquez had the means to engage in a cocaine

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[7] Perez testified that Vasquez would call him from time to time to "play the numbers," an apparent reference to gambling.

importation scheme strikingly similar to the charged offenses. And when we view this evidence with the felon testimony about Vasquez having connections to pull out cocaine-bearing containers and with the evidence that Vasquez was a previous drug trafficker, we have no difficulty in determining that the excluded evidence makes a factor favorable to the defense theory more probable: that Vasquez cannot be ruled out as the importer of the cocaine in this case.

The district court excluded (1) Bover's testimony because he could not testify that Vasquez was Perez's source for the cocaine charged in this case, and (2) the evidence of Vasquez's container importations because it was too remote in time to be relevant. In Stephens, we cautioned trial courts against establishing "too high of a threshold for the introduction of potentially exculpatory evidence." Stephens, 365 F.3d at 980. Bover's testimony and the excluded shipping evidence "does not establish with certainty" that Vasquez supplied the drugs in this case. Id. But the excluded evidence "bolsters the defense theory" that Perez, due to his drug trafficking activities and continuing relationship with Vasquez, may have had a motive to protect Vasquez. Id. And the excluded evidence tends to show that Vasquez had the means to import drugs in the manner charged in this case, which supports the defense theory that Vasquez was the true drug supplier in this case.

The government maintains that the excluded evidence was too remote in time to be relevant: Bover would have testified to conduct that occurred approximately three to four years before the conduct charged in this case, and the evidence about Vasquez's shipping occurred approximately one year before the charged conduct. But courts generally should not prohibit a defendant from presenting a defense theory to the jury when some factual basis can support that theory. See United States v. Thompson, 25 F.3d 1558, 1564 (11th Cir. 1994). The excluded evidence here did provide some factual basis to

support a crucial element of the defense theory. And we remember that we had, before this trial, allowed evidence of conduct that was even more temporally remote. See United States v. Calderon, 127 F.3d 1314, 1332 (11th Cir. 1997) (in the context of a Rule 404(a) ruling time span of conduct occurring six years before charged offense not too remote for proper consideration); United States v. Phelps, 733 F.2d 1464, 1472 (11th Cir. 1984) (five years). Of course, the inquiry is not "a mechanical application based solely on the amount of time that has elapsed between the prior extrinsic act and the present offense." United States v. Scott, 701 F.2d 1340, 1346 (11th Cir. 1983).

We also conclude that the exclusion of this evidence affected Gonzalez's substantial rights on his conviction for possession with intent to distribute cocaine. The evidence of Gonzalez's guilt was not overwhelming on that charge. See Calle, 822 F.2d at 1021. As in Stephens, the government's case lacked the corroborating evidence commonly found in cases of extensive drug dealing. Stephens, 365 F.3d at 977. The only physical evidence tying Gonzalez to the cocaine in this case is that the cocaine wrappers found in Garcia's garage in November 1998 bore the same "357" marking as the cocaine found in March 1999 in container "378-6, which was consigned to Gonzalez's tile company. But Garcia, notably, did not testify that he knew that Gonzalez was the ultimate source of the cocaine.

And Perez was the government's chief witness: his testimony provided the only actual link between Gonzalez and the drugs. Had the jury disbelieved his testimony, little evidence existed on which to base a guilty verdict. Evidence about Perez's motive to protect Vasquez, as well as evidence suggesting that Vasquez could have had the experience and knowledge to import the cocaine in a manner similar to the charged conduct, could have been "quite probative to the jury."

Stephens, 365 F.3d at 980. The evidence went to the heart of the defense and was material: without being able to show the possible drug trafficking aspect to the Perez-Vasquez relationship, Gonzalez's defense theory was much less plausible.

Considering the circumstances, we conclude that the exclusion of the testimony about the prior drug trafficking relationship between Perez and Vasquez "was more likely than not a substantial factor" in Gonzalez's conviction for possessing cocaine with the intent to distribute the drug. Stephens, 365 F.3d at 980. This evidence could have played an important role in the jury's deliberations on this charge, and, therefore, affected Gonzalez's substantial rights.

But on the conspiracy-to-import charge, we cannot conclude that the exclusion of Vasquez's phone records and shipping records had the same kind of substantial influence on the jury.[8] Unlike the conviction for possession with intent to distribute, several other facts in evidence corroborated the government's theory. These undisputed facts include that the container filled with cocaine was consigned to Gonzalez's company, Yalorde Tile. In addition, Yalorde's representative in Ecuador hired one company to load some containers and another person to load others, even though the containers were being filled with products from the same company.[9] And the

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[8] The excluded Bover testimony on the Perez-Vasquez drug trafficking relationship is not particularly relevant to the facts about the March 1999 container importation; and the March 1999 container importation is the basis for the conspiracy to import charge.

[9] In a vacuum, this business practice does not mean much. But, when coupled with the government's discovery of

importation charge is not mostly dependent on Perez. Thus, Gonzalez's conviction on the importation charge is not like Stephens where corroborating evidence is "absent." 365 F.3d at 977. Nor is it like Calle where the government presented "no other evidence upon which [the jury] could have based a guilty verdict." 822 F.2d at 1021. In the light of these conclusions, we are not "left in grave doubt" that "the error itself had substantial influence" on the jury's verdict. Stephens, 365 F.3d at 977.

CONCLUSION

In the light of Stephens, we vacate Gonzalez's conviction under 21 U.S.C. § 841(a)(1), and remand for a new trial on that count. We affirm Gonzalez's conviction under 21 U.S.C. § 963. Gonzalez's sentence is vacated to be determined on remand.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

1500 pounds of cocaine on one of the separated containers, it could support a jury's finding of guilt.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-13611-CC

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN MIGUEL GONZALEZ,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: EDMONDSON, Chief Judge, WILSON, Circuit Judge, and RESTANI*, Judge.

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*Honorable Jane A. Restani, Chief Judge, United States Court of International Trade, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

CHIEF JUDGE

Supreme Court, U.S.
FILED
MAR 13 2006
OFFICE OF THE CLERK

(2)

No. 05-793

In the Supreme Court of the United States

JUAN MIGUEL GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals incorrectly placed the burden on petitioner to demonstrate prejudice from preserved claims of evidentiary error.

2. Whether the court of appeals, in reviewing petitioner's claims of evidentiary error, erred in applying the harmless error standard of *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946), under which error is harmless unless it had a "substantial and injurious effect" on the jury's verdict, rather than the "harmless beyond a reasonable doubt" standard articulated in *Chapman* v. *California*, 386 U.S. 18 (1967).

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In the Supreme Court of the United States

No. 05-793

JUAN MIGUEL GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is not published in the *Federal Reporter*, but the decision is available at 140 Fed. Appx. 170.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 2005. A petition for rehearing was denied on September 14, 2005 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on December 13, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing at least five kilograms of

cocaine with intent to distribute it, in violation of 21 U.S.C. 841, and of conspiring to import at least five kilograms of cocaine, in violation of 21 U.S.C. 963. 7/9/03 Indictment 1-3. He was sentenced to 360 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed the conspiracy-to-import conviction, vacated the possession conviction, and remanded for further proceedings. Pet. App. 1a-15a.

1. On September 19, 2000, a grand jury in the Southern District of Florida returned a five-count superseding indictment charging petitioner and several co-defendants with federal narcotics violations. Pet. 5. After three mistrials, the case was retried on a redacted version of the superseding indictment that charged petitioner and co-defendants Juan Gonzalez (Tito)[1] and Oscar Gomez with conspiring to possess at least five kilograms of cocaine, in violation of 21 U.S.C. 846, during the period from February 1998 to April 1999 (Count I); and possessing at least five kilograms of cocaine with intent to distribute it, in violation of 21 U.S.C. 841, during October and November 1998 (Count II). Petitioner and Tito were also charged in a third count with conspiring to import at least five kilograms of cocaine, in violation of 21 U.S.C. 963, in March 1999 (Count III). Corrected Gov't C.A. Br. 2; Redacted Indictment 1-5. The jury found petitioner guilty on Counts II and III but acquitted him on Count I. Tito and Oscar Gomez were acquitted on all counts. Pet. App. 2a n.2.

According to the government's evidence, petitioner imported cocaine from Colombia via Ecuador and sold it to Miami customers, including Luis Perez. Perez then

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[1] Petitioner and Tito are not related. See Pet. App. 2a n.1.

sold the cocaine to his own customers, including Gomez and Enrique Bover. The government's case depended largely on Perez's testimony, particularly for the possession count. Petitioner's defense was that Perez implicated him to protect the true cocaine supplier, Jorge Luis Vasquez. Pet. App. 2a-3a.

Perez testified that, in September, October, and November 1998, he made three purchases of multi-kilogram quantities of cocaine from petitioner, with Tito serving as an intermediary. According to Perez, petitioner and Tito told him that petitioner obtained his cocaine from Colombian suppliers and that the cocaine purchased by Perez would arrive by ship in containers. Perez testified that he picked up the cocaine from petitioner's garage on the first two occasions, and from Tito's garage on the third. Perez then sold the cocaine to his customers, including Gomez, Bover, and Bover's brother-in-law, Orlando Garcia. In November 1998, Garcia and Bover were arrested. DEA agents searched Garcia's house and found empty cocaine wrappers with the notation "357" written on them. Garcia testified that Perez was his only supplier of cocaine in late 1998. In January 1998, Perez was arrested. Pet. App. 3a-4a.

The government also presented evidence establishing that, on March 12, 1999, a U.S. Customs officer searching a ship at Port Everglades, Florida, found pallets of floor tiles and 1500 pounds of cocaine spilling out of a broken 40-foot container. The cocaine packages had been concealed under a false bottom and bore the same handwritten "357" marking as the packages found in Garcia's garage. The container was consigned to Yalorde Tile Company, a Miami business owned by petitioner. The evidence established that in February 1999, Yalorde Tile had ordered several containers of tile from an Ecua-

dorian tile supplier. Yalorde's representative in Ecuador hired a person who picked up two of the containers on February 17, 1999, loaded them, and returned them to the port two days later. One of the two containers was swapped for the false-bottomed container that was later discovered in Florida filled with cocaine. Pet. App. 5a-6a.

The defense attempted to establish through cross-examination of Perez that Perez was attempting to protect Vasquez. Perez admitted that Vasquez was the godfather to his son and that he maintained a close relationship with Vasquez; that Vasquez communicated often with Perez during October and November 1998; and that Perez bought thousands of dollars of furniture for Vasquez during that time. After Perez denied that he had told anyone that Vasquez was the true supplier of the cocaine, the defense presented the testimony of two convicted felons who claimed that Perez had told them while the three were incarcerated that Vasquez was his source. On redirect, Perez again denied that he had engaged in drug trafficking with Vasquez. Pet. App. 4a.

In presenting its own case, the defense sought to have Bover testify that Vasquez had supplied cocaine to Perez in 1994 and 1995, before the charged conduct. The district court excluded that testimony on the grounds that it was too remote in time and that impeachment of Perez could not be accomplished by extrinsic evidence. The court also excluded freight invoices that would have established that Vasquez had arranged for the importation of several containers of produce from Ecuador to South Florida in late 1997, and cellular telephone records showing that Vasquez had called Perez and other persons in South America during the same time frame. Petitioner sought admission of the invoices

and the telephone records in an effort to establish that Vasquez had the ability and experience to import cocaine in containers from Ecuador. The district court concluded that the invoices and telephone records were inadmissible because the defense did not have similar evidence for 1998 or 1999. Pet. App. 5a, 12a-13a.[2]

2. On appeal, petitioner claimed that the district court abused its discretion under the Federal Rules of Evidence and denied him a fair trial by excluding Bover's testimony, the Vasquez invoices and telephone records, certain recorded statements of Perez, and an Ecuadorian police report. Pet. C.A. Br. 22-42.

In an unpublished opinion, the court of appeals affirmed the conspiracy-to-import conviction, vacated the possession conviction, and remanded for further proceedings. Pet. App. 1a-15a. The court stated that, to prevail on his claims, petitioner was required to establish that: (1) "his claim was adequately preserved or that the ruling constituted plain error"; (2) "the district court abused its discretion in interpreting or applying an evidentiary rule"; and (3) the "error affected . . . a substantial right." *Id.* at 7a-8a (quoting *United States* v. *Stephens*, 365 F.3d 967, 974 (11th Cir. 2004)). After finding that petitioner had adequately preserved his evidentiary claims for appeal, the court of appeals concluded that the district court had abused its discretion by excluding Bover's testimony. *Id.* at 9a-10a. The court of appeals explained that Bover's testimony was relevant under Federal Rule of Evidence 401 to estab-

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[2] For similar reasons, the court also excluded evidence offered by the government that, in March 2000, petitioner and Tito had been arrested in Spain for possible narcotics violations in connection with a scheme to import paint drums into Madrid. Corrected Gov't C.A. Br. 28.

lish "that Perez had a motive to protect Vasquez" and that the testimony could "tend[] to show that it was more likely that Vasquez may have supplied drugs to Perez in late 1998," and that the testimony also could have been used under Rule 608(b) to impeach Perez's claim "that he had not trafficked drugs with Vasquez." *Id.* at 10a-11a. With respect to the 1997 Vasquez invoices and telephone records, the court of appeals concluded that the district court had abused its discretion by excluding that evidence, because the evidence "makes it at least slightly more probable that Vasquez had the means to engage in a cocaine importation scheme strikingly similar to the charged offenses." *Id.* at 11a-12a.

Turning to the question of prejudice, the court of appeals concluded (Pet. App. 13a-15a) that the district court's errors affected petitioner's substantial rights with respect to the possession count but not the conspiracy-to-import count. The evidence on the possession charge, the court explained, was "not overwhelming," as "[Perez's] testimony provided the only actual link between [petitioner] and the drugs." *Id.* at 13a. Thus, "[e]vidence about Perez's motive to protect Vasquez, as well as evidence suggesting that Vasquez could have had the experience and knowledge to import the cocaine in a manner similar to the charged conduct, could have been 'quite probative to the jury.'" *Id.* at 13a-14a (quoting *Stephens*, 365 F.3d at 980). Under the circumstances, the court concluded that the exclusion of that evidence "'was more likely than not a substantial factor' in [petitioner's] conviction for possessing cocaine with intent to distribute [it]." *Id.* at 14a (quoting *Stephens*, 365 F.3d at 980).

In contrast, the court concluded that the excluded Bover testimony was not "particularly relevant" to the